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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D C. 20554

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SEP 14 1993

In the Matter of )  
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Clark-Bader, Inc. d/b/a )  
TMC Long Distance )  
 )  
Complainant, )  
 )  
v. )  
 )  
Pacific Bell Telephone Company, )  
 )  
Defendant. )

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

CC Docket No. 93-161  
File No. E-89-85

To: Honorable Walter J. Miller  
Administrative Law Judge

MOTION FOR IMPOSITION OF SANCTIONS

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September 14, 1993

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### SUMMARY

Complainant Clark-Bader, Inc. d/b/a TMC Long Distance ("TMC"), hereby seeks the imposition of sanctions against Defendant Pacific Bell Telephone Company ("PacBell") for PacBell's destruction of critical records, the existence of which PacBell failed to disclose to TMC in the course of predesignation discovery in this proceeding. TMC had asked in its predesignation interrogatories whether any diagnostic tests of the relevant system and circuits had been conducted by PacBell during the period covered by the complaint herein. PacBell's answers to these interrogatories failed to disclose that there was in fact an extensive automated diagnostic testing system in place covering this entire period, which would have produced extensive evidence regarding such problems as post-dial connection delay that are at the heart of TMC's complaint against PacBell.

TMC discovered the existence of this diagnostic system a few days ago in the course of preparing its direct case. When TMC's attorneys inquired as to the existence of these diagnostic studies, they were informed that the studies and all underlying data were subsequently destroyed by PacBell. TMC seeks sanctions against PacBell for its actions both in failing to disclose the existence of these diagnostic studies in response to interrogatories specifically asking about such information, and in subsequently destroying the studies and underlying data that is clearly relevant to TMC's complaint. The sanctions that should be imposed include the direction of adverse findings against PacBell on the factual issues of post-dialing delay and of

PacBell's knowledge of such post-dialing delay, and the requirement that PacBell pay TMC's legal fees and related expenses incurred since the filing of its complaint.

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To: Honorable Walter J. Miller  
Administrative Law Judge

**MOTION FOR IMPOSITION OF SANCTIONS**

Complainant Clark-Bader, Inc. d/b/a TMC Long Distance ("TMC"), by its attorneys, hereby respectfully requests that the Presiding Judge impose sanctions against Defendant Pacific Bell Telephone Company ("PacBell") for its destruction of critical records, the existence of which PacBell failed to disclose to TMC in response to pre-designation interrogatories. As set out in detail below, TMC discovered within the last few days that such critical records and reports, which were clearly within the scope of TMC's 1989 interrogatories, had existed at the time of the subject interrogatory response, but were wilfully and deliberately withheld from TMC, and TMC was informed yesterday that such records had subsequently been destroyed by PacBell. TMC submits that the appropriate sanction that should be imposed against PacBell in this instance, at the minimum, should be a

requirement that certain factual findings relating to the withheld, destroyed documents be entered against PacBell and that PacBell pay all of TMC's legal and related expenses incurred since the filing of TMC's complaint. In support of this Motion, the following is shown.

I. Background

1. Sections 1.729 and 1.730 of the Commission's Rules provide for limited pre-designation discovery rights in common carrier formal complaint proceedings such as in the instant case. Section 1.729 provides that a complainant may submit up to 30 written interrogatories to the defendant party within 30 days after the complainant's reply to the defendant's answer to the complaint is due. Section 1.730 provides further that a complainant may file a request for other types of discovery, such as a request for production of documents or for depositions, within 30 days following the submission of the interrogatories under Section 1.729.

2. TMC utilized these pre-designation discovery procedures subsequent to the filing of its complaint in this proceeding. TMC submitted its "First Set of Interrogatories" to PacBell on May 15, 1989. In its Interrogatories, TMC requested, inter alia, the following items of information:

Interrogatory 4

Itemize all . . . diagnostic tests applied from PacBell's Anaheim Network Control Center and/or any other location to the Northern Telecom DMS-200 90T tandem switch (hereinafter the "Tandem") or to any central office that feeds the Tandem, beginning on the date the Tandem first became operational and continuing through the end of 1988 . . . .

Interrogatory 6

Identify each carrier . . . that presently has, or has had at any time, access traffic routed through the Tandem [and] . . . the length of any post-dial delay experienced by callers of that carrier.

Interrogatory 16

Identify . . . any . . . access time studies relating to the use of the Tandem in LATA 732 . . . .<sup>1</sup>

PacBell responded to these interrogatories on September 8, 1989. PacBell's Answers to these interrogatories made mention only of a single diagnostic test which PacBell provided at TMC's request.<sup>2</sup> No further information concerning diagnostic tests, post-dial delay or access time studies were provided. PacBell did

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<sup>1/</sup> A copy of TMC's First Set of Interrogatories is appended hereto as Attachment A, and a copy of PacBell's Answers is appended hereto as Attachment B.

<sup>2/</sup> The one diagnostic test which PacBell documented was one in which TMC was a participant and which PacBell therefore could not deny the existence of. PacBell did not acknowledge the existence of any other diagnostic capabilities. As TMC will demonstrate in its Direct Case, the test which PacBell documented was a sham. PacBell's test was not conducted during the tandem switch's "busy hour", i.e., the time during which the tandem handles the most calls and therefore is most likely to exhibit problems. Moreover, TMC experienced difficulties from 1985 - 1988, yet PacBell's documented test was performed only one day.

not file any supplemental responses to these three interrogatories.

II. PacBell Has Withheld Information That is Highly Relevant and Material to TMC's Case.

3. During the process of preparing its Direct Case over the past several days, TMC's counsel's research revealed the existence of a study commissioned by PacBell concerning post-dial delay. This study is entitled "The Effects of Changing Post-Dial Delay on Customer Abandonments and Perceptions of Service" (the "PacBell Study") co-authored by Dr. Robert Mercer of Hatfield Associates and Drs. Frederick Chang and William Edwards of Pacific Bell. The PacBell Study was provided as an attachment to PacBell's Direct Case that was filed with the FCC on April 21, 1989, in another unrelated Commission proceeding, in CC Docket No. 88-287. A copy of the PacBell Study is appended hereto as Attachment C.

4. A review of the PacBell Study shows that it was based, in part, on data provided by an automated system known as the Service Evaluation System II ("SES II") which collected call attempt data during March and April, 1987. According to the PacBell Study at page 3,

SES II is a mechanized process by which call attempts are monitored from the time the customer goes off-hook until the attempt is either completed or abandoned. The time sequence of several events during the attempt is recorded, including end of dialing, first network response, answer by called party, and customer abandonment on unsuccessful attempts. The dialed digits are also recorded, and the attempt is classified into Intra-LATA, InterLATA/Intra-State, and InterLATA/

Inter-State. . . . SES II has a sophisticated and accurate ability to recognize network tones and speech, and is thus able to record the call disposition as well.

The PacBell Study further states that, "[i]n Pacific Bell, SES II data is . . . collected in 500 end offices. With a bogey of 500 dial line observations per office per month, in excess of 250,000 observations per month are recorded." Id. In other words, the SES II system continually monitors the PacBell call attempts from 500 end offices within the PacBell system. In the CC Docket No. 88-287 proceeding, the PacBell Study referred to above was based on call attempt data collected during March and April, 1987, a period covered by the instant TMC discrimination complaint (i.e., 1985 to 1988).

5. Additionally, one particularly critical component of the SES II reporting system is the Incoming Trunk Service Evaluation ("ITSE") report, which provides data "in which call attempts are picked up at the point they are incoming to a terminating tandem switch and followed from there to their final disposition." PacBell Study at fn. 1.

6. The information provided by the SES II reporting system and its component ITSE report are directly relevant and material to TMC's case. According to a Bell Laboratories technical journal article entitled "Taking the Pulse of the Network,"<sup>3</sup> the SES II system "could efficiently pinpoint too many unsuccessful

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<sup>3/</sup> Bell Laboratories Record, March 1982, pages 70-74 (hereinafter referred to as "Pulse Article"). A copy of the Pulse article is appended hereto as Attachment D.

attempts to a large business customer, such as an airline or hotel. That business could then be informed of the problem and of ways to eliminate it. The No. 2 system could also measure service from toll offices to exchange offices, a useful gauge of the quality of exchange access." Pulse article, Attachment D hereto, p. 73 (emphasis added).

7. It is absolutely clear that the SES II data is exactly the type of diagnostic testing information that was sought by TMC's pre-designation Interrogatories over four years ago as discussed above. Specifically, Interrogatory 4 requested information concerning "diagnostic tests applied from PacBell's Network Control Center and/or any other location to the . . . 90T . . . or any central office . . . beginning on the date the Tandem first became operational and continuing through the end of 1988 . . . ." According to the PacBell Study referred to above, the SES II data is used "on a routine basis to monitor and try to correct situations where high rates of Equipment Blockage and Failure dispositions are occurring." PacBell Study at 3 (emphasis added). Also, the Pulse Article (Attachment D) lists three separate reports provided by the SES II system, including "[r]eports targeted to the Network Service Centers that provide an up-to-date view of how each Center's area of the network is performing." Pulse Article at p. 74.

8. Further, Interrogatory 16 requested information concerning "any other access time studies relating to the use of the Tandem in LATA No. 732 . . . ." This is again precisely the

type of information that the PacBell Study indicates is provided by the Incoming Trunk Service Evaluation report. See PacBell Study at fn 1.

9. Finally, Interrogatory 6 requested information concerning "the length of any post-dial delay" experienced by callers subscribing to any carrier whose traffic was routed through the access tandem used by TMC. The SES II data was used in the PacBell Study precisely because it provided information concerning post-dial delay.<sup>4</sup> Thus again, although PacBell's 1989 response to this Interrogatory provided no data regarding post-dial delay, the SES II data clearly existed at that time and was directly called for by this Interrogatory.

10. On September 8, 1993, TMC's counsel notified PacBell's counsel by telephone conversation that he had discovered the existence of the SES II monitoring system in the course of his research of the PacBell Study that was submitted to the Commission in CC Docket No. 88-287. TMC's counsel stated to PacBell's counsel that he desired to obtain the underlying SES II information for the entire period covered in the instant complaint (1985 to 1988), since the existence of such critical

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<sup>4/</sup> TMC recognizes that the SES II reporting system surveys the progress of calls through end offices and tandem offices throughout PacBell's service territory in California some of which may not be relevant to this case. Nevertheless, it cannot be seriously disputed that that portion of the SES II and the ITSE reports which provided information concerning the performance of the 90T and its associated end offices from 1985 to 1988 was and is directly relevant and extremely material to TMC's case.

data should have been disclosed to TMC by PacBell in response to TMC's 1989 Interrogatories. This request was repeated during the mandated settlement conference held in San Francisco on September 10, 1993. PacBell's attorney has repeatedly indicated that she could not spend a great deal of time to locate this information and that TMC has had over four years to obtain this data. By letter dated September 9, 1993, attached hereto as Attachment E, TMC's counsel requested that PacBell provide the SES II and ITSE data. TMC also requested that PacBell provide "any documents which discuss and/or analyze the results of both the SES II and the Incoming Trunk Service Evaluation data for LATA 6." TMC's counsel contacted PacBell's counsel by telephone again on September 13, 1993 about consenting to an extension of time to file Direct Cases until PacBell produced this vital evidence and TMC had time to review it and incorporate it into its direct case. PacBell's attorney responded that she would not agree to such an extension. Approximately one hour later, PacBell's attorney called to notify TMC that the data it requested has been destroyed and that no data past January 1, 1989 exists. TMC's counsel informed PacBell that it nevertheless wanted PacBell to determine whether the more limited information for the two months in 1987 upon which the PacBell Study was based is still available from the researchers who produced the study. PacBell's attorney did not indicate whether her client would

provide any documents analyzing or discussing the SES II and ITSE data for LATA 6.<sup>5</sup>

11. PacBell cannot reasonably claim that it or its attorneys had no knowledge of the SES II monitoring system or the PacBell Study at the time that the TMC Interrogatories were filed and answered in 1989. The PacBell attorney who filed the PacBell Direct Case with the Commission in CC Docket No. 88-287 on April 21, 1989 was James Tuthill. Insofar as the PacBell Study which relied upon the SES II system data was an attachment to PacBell's Direct Case in that Docket, Mr. Tuthill obviously knew of the existence of the SES II system. Mr. Tuthill is and was the lead counsel for PacBell in TMC's formal complaint proceeding during this same period. Less than a month later, on May 15, 1989, Mr. Tuthill was served with a copy of TMC's Initial interrogatories as PacBell's lead counsel in the instant case. Indeed, Mr. Tuthill's name appeared on the signature block of the PacBell September 8, 1989, response to TMC's Interrogatories, containing the false answers that no monitoring information existed. There can, therefore, be no doubt that PacBell deliberately and wilfully withheld crucial information from TMC and this tribunal.

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<sup>5/</sup> A Declaration from TMC's counsel attesting to the above stated facts is appended hereto as Attachment F.

III. Sanctions Should Be Imposed Against PacBell  
for Withholding this Critical Information  
Regarding Post-Dialing Delay

12. As demonstrated above, timely disclosure by PacBell of the existence of the SES II diagnostic system's extensive data relating to post-dial delay and other system defects was thus clearly called for in response to TMC's Interrogatories. In addition, if the existence of this extensive diagnostic data had been timely disclosed by PacBell, TMC would then have had an opportunity to seek production of this critical data, which goes to the heart of its complaint against PacBell, through a motion for production of documents under Section 1.730 of the Rules, prior to the time when such data was subsequently destroyed by PacBell.

13. Depending on the nature and results of such critical data regarding post-dial delay through the 90T tandem switch as compared to other switches, the course of this entire proceeding could have been very different. We believe that this data, spanning the entire period that is the subject of TMC's discrimination complaint, would show conclusively that there was indeed extensive post-dial delay and other defects associated with the 90T switch through which TMC's access was provided. Moreover, this data would have established conclusively PacBell's knowledge and wilful failure to remedy TMC's difficulties in obtaining equal access. In addition, this information would have established a basis for calculating TMC's damages. With this information, this proceeding could have been resolved through the

much less expensive, typical common carrier all-paper complaint proceeding, rather than through this much more expensive administrative hearing proceeding.<sup>6</sup>

14. TMC has come a long way and has spent literally hundreds of thousands of dollars in legal and expert witness fees since 1989, when the existence of this critical data should have been disclosed by PacBell. PacBell cannot possibly justify its failure to disclose the existence of this critical SES II diagnostic data, nor its subsequent action in destroying this data that goes to the heart of TMC's complaint.

15. PacBell's false Interrogatory responses and its destruction of critical evidence warrant the imposition of significant sanctions against PacBell for these abuses. It is fundamental that the Presiding Judge in a hearing proceeding has considerable power and discretion under Sections 0.341 and 1.323(d) of the Rules to impose and fashion sanctions appropriate to the misconduct of a party in knowingly providing false and misleading responses to valid discovery requests. See, e.g., Vue-Metrics, Inc., 69 FCC 2d 1049, 1058-1059 (1978); Mid-Ohio/Capital Communications Limited Partnership, 4 FCC Rcd 8125, 8126 (Rev. Bd. 1989), rev. den., FCC 90-209, released June 7, 1990. TMC submits that sanctions are clearly warranted

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<sup>6/</sup> Even if, contrary to TMC's belief, this SES II diagnostic data had showed conclusively that there was no post-dial delay at all, TMC perhaps would have been convinced to drop its complaint, notwithstanding its belief that access discrimination had taken place, based on the possible difficulty in overcoming such critical data that turned out to be negative to its case.

against PacBell for these abusive actions, and that an appropriate sanction in this situation is for the entry of findings of fact conclusively establishing that (1) TMC suffered significant post-dial delay problems for traffic routed through the 90T switch; (2) PacBell knew of the problems suffered by TMC; and (3) PacBell knew that TMC did not receive equal access through the 90T switch. PacBell should also be ordered to pay TMC's expenses incurred since the time of the submission of PacBell's false responses to TMC's Interrogatories. The imposition of such sanctions are within the Presiding Judge's powers and warranted in view of the gravity of PacBell's false and misleading responses to TMC's valid discovery requests.

16. TMC's request that such findings of fact as to post-dial delay and PacBell's knowledge thereof be entered against PacBell is consistent with Section 1.323(d) of the Rules, as well as with what is known as the "spoilation inference" in the law of evidence. The spoilation inference is a legal doctrine which allows the factfinder to draw an unfavorable inference against a litigant who has destroyed documents relevant to a legal dispute. See, e.g., Bird Provision Co. v. Owens County Sausage, Inc., 379 F. Supp. 744, 751, (N.D. Tex. 1974), aff'd, 568 F.2d 369 (5th Cir. 1978); C. McCormick, McCormick's Handbook of the Law of Evidence § 273 (E. Cleary 3d ed. 1984). As a discovery abuse sanction for destruction of evidence, when as here the destroyed evidence cannot be reconstructed, the courts will typically deem facts as established for the purposes

of the litigation. See Rogers v. Chicago Park District, 89 F.R.D. 716 (N.D. Ill. 1981) (facts deemed established against employer as to unfair hiring practices after discoverable patronage letters were destroyed); United States v. Nassau County, 28 Fed R. Serv. 2d (Callaghan) 165 (E.D.N.Y. 1979); Alliance to End Repression v. Rochford, 75 F.R.D. 438 (N.D. Ill. 1976). Section 1.323(d) of the Commission's own Rules embraces this sanction insofar as it provides for "adverse findings of fact and dismissed with prejudice" where a party fails to provide a complete answer to an interrogatory in response to a granted motion to compel. Here, of course, an order compelling a more complete answer under § 1.323(d) is not a sufficient remedy because the answer is not merely incomplete, but was misleading at the time when made, thereby precluding TMC from seeking the SES II data prior to the time it was destroyed. Now that the SES II data has been destroyed by PacBell's voluntary action, compelling its production is moot, and the sanction should be the adverse findings of fact requested here by TMC.<sup>7</sup>

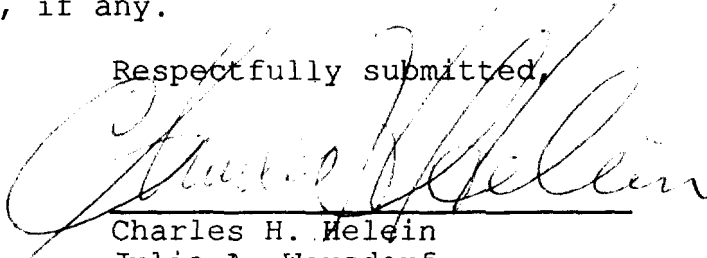
WHEREFORE, for all the foregoing reasons, TMC respectfully requests that sanctions be imposed against Pacific Bell Telephone consisting of Pacific Bell Telephone being required to pay TMC legal and related expenses incurred from September 8, 1989

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<sup>7/</sup> Indeed, since this is not a comparative proceeding, TMC does not intend to seek enlargement of the issue as to whether PacBell engaged in misrepresentations in its subject interrogatory responses as discussed above. Such possible enlargement of issues is a matter more appropriate for consideration by the Common Carrier Bureau as the guardian of Commission processes.

through the conclusion of this administrative hearing proceeding and related appeals, if any.

Respectfully submitted,

A large, stylized handwritten signature in dark ink, appearing to read "Charles H. Meloin", is written over a horizontal line.

Charles H. Meloin  
Julia A. Waysdorf  
Donald H. Manley  
Michael R. Carithers

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Attorneys for  
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TMC Long Distance, Inc.

September 14, 1993

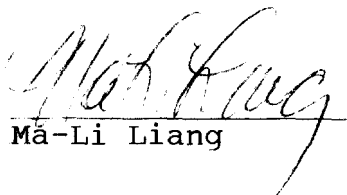
CERTIFICATE OF SERVICE

I, Ma-Li Liang, hereby certify that on this 14th day of September 1993, a true and correct copy of the foregoing "Motion for Imposition of Sanctions" in CC Docket No. 93-161, was served on the following in the manner indicated:

Via Federal Express to: James P. Tuthill, Esquire  
Nancy C. Woolf, Esquire  
Pacific Bell Telephone Company  
140 New Montgomery Street  
Room 1530-A  
San Francisco, CA 94105

Via hand delivery to: Thomas D. Wyatt, Esquire  
Chief  
Formal Complaints and Investigation  
Branch  
Federal Communications Commission  
Room 107  
1250 23rd Street, N.W.  
Washington, D.C. 20554

The Honorable Walter C. Miller  
Administrative Law Judge  
Federal Communications Commission  
Room 213  
2000 L Street, N.W.  
Washington, D.C. 20036

  
Ma-Li Liang

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FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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MAY 15 1989

Federal Communications Commission  
Office of the Secretary

CLARK-BADER, INC., d/b/a )  
TMC LONG DISTANCE, INC. )  
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Complainant, )  
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v. )  
 )  
PACIFIC BELL TELEPHONE COMPANY, )  
A PACIFIC TELESIS COMPANY, )  
 )  
Defendant. )  
\_\_\_\_\_ )

File No. E-89-85

To Pacific Bell Telephone Company:

**COMPLAINANT'S FIRST SET OF  
INTERROGATORIES AND  
REQUEST FOR PRODUCTION OF DOCUMENTS**

Clark-Bader, Inc., d/b/a TMC Long Distance, Inc.,  
Complainant in the above-captioned proceeding, by its  
attorneys and pursuant to Section 1.729 of the FCC Rules,  
hereby requests that Defendant Pacific Bell Telephone Company  
("PacBell") answer the following interrogatories separately  
and fully under oath and produce the documents requested in  
the following requests for production at the offices of Dow,  
Lohnes & Albertson, 1255 Twenty-third Street, N.W., Suite  
500, Washington, D.C. 20037, on or before June 14, 1989.

**GENERAL GUIDELINES,  
DEFINITIONS AND INSTRUCTIONS**

A. Each interrogatory shall be deemed continuing  
in nature. Therefore, PacBell should update, revise,

supplement, or otherwise keep current any information provided in response to these interrogatories, as facts or circumstances change or become known.

B. PacBell is requested to answer each interrogatory fully and completely. Requests for information or documents in each interrogatory or request for production extend to information known or available to, and documents known or available or in the possession or control of, PacBell, its officers, directors, stockholders, other principals, employees, representatives (including legal counsel), agents, servants, and investigators.

1. As used herein, the words "document" or "documents" are used in the customary broad sense and include, but are not limited to, the original and any non-identical copy, and/or amendment thereof, of the following items: any contract, tariff (state or federal), letter, memorandum, report, hand-written note, working paper, summary of data, data compilation sheet, computer printouts, interview report, record, bill, receipt, cancelled check, order, audio and/or video recording, or any other hand-written, typed, printed or graphic materials to which PacBell or any of its agents or representatives have access.

2. As used herein, the words "identify", "identity", or "identification", when used in reference to a document, mean to fully describe each document identified,

including the name of the document, and to provide the following additional information:

(a) the general type of document (e.g., letter, correspondence, note, memorandum, telegram, cable, sound recording, drawing, diagram, blueprint, photograph, data card, data printout, etc.);

(b) the general subject matter(s) of the document;

(c) the date(s) appearing on such document, and, if no date so appears, then to so state and to give the date or best approximate date on which such document was prepared and/or executed;

(d) any identifying label, code number, file number, name, marking or title;

(e) the number of pages of length;

(f) every author and every person (whether an officer, agent or employee of PacBell) who participated in the preparation and/or negotiation of the document, whether such person signed the document or not;

(g) if the document was produced by negotiations, the date on which such negotiations commenced and ended;

(h) every person to whom such document was addressed or to whom a copy was directed;

(i) each person having possession, custody or control of such document; and

(j) the material contents of the document; material contents herein being defined to include, but not be limited to, those provisions relating to the subject matter thereof; any effective dates; the duration of all actions or obligations addressed in the document; directions, instructions or conditions affecting or relating to the facilities, equipment, lines, specifications, and the performance thereof; the directions, instructions or conditions affecting or relating to the performance of any actions or the refraining from actions by PacBell or others; prices; rates; sharing of revenues or obligations; renewal provisions; cancellation or termination provisions; damages, liquidated or compensatory; warranties; representations; restrictive covenants; or conditions precedent or subsequent, or any other subject matter, schedule, drawing, print, readout, output, diagram, blueprint, or text material to the subject matter of the Complaint.

Alternatively, the document may be produced as an attachment to the interrogatory answers.

3. In the event that there existed at any time a document about which information is requested in these interrogatories and which no longer is in existence or cannot be found, this fact should also be provided, plus an

explanation as to why it is no longer in existence or cannot be found. For each such document, identify its last known location, its last known custodian, and state also whether such document is (a) missing or lost; (b) destroyed; (c) transferred to others; or (d) otherwise disposed of; and in any such instance set forth the surrounding circumstances and any authorization for such disposition and state the approximate date of any such disposition, and, if known, also the present location and custodian of such document.

C. Each interrogatory shall be answered under oath or penalty of perjury.

D. As used herein, the words "identify", "identity", or "identification" mean, when referring to natural persons, to state the name, residence address or last known residence address, telephone number(s), business or place of employment of the person to be identified, and during each relevant time period, each of his/her job description(s), position(s), scope of authority, to whom he/she reports, whether as supervisor or officer, such supervisor's or officer's job description, position, scope of authority, and to whom such supervisor or officer reports and the job description, position, and scope of authority of that supervisor or officer; when referring to oral conversations or an event or occurrence, including a meeting or a negotiation session, the term "identify" means to specify the